IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 2ND APRIL 2007 / 12TH CHAITHRA 1930

SA.No. 546 of 1993(F)

AS.83/1988 of III ADDL. DISTRICT COURT, THIRUVANANTHAPURAM
OS.282/1981 of ADDL.MUNSIFF COURT,THIRUVANANTHAPURAM

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APPELLANTS:RESPONDENTS-PLAINTIFFS

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1. M.ABUBAKER, NIRATHUKONAM PARAYIL VEEDU
PUNALAL MURI, VELLANADU PAKUTHI,
THIRUVANANTHAPURAM TALUK AND DISTRICT
FROM KOLLANAZHIKAM VEEDU,IRANIMUTTOM MURI
AND PAKUTHI, THIRUVANANTHAPURAM TALUK AND DISTRICT.

2. M.ABDULKARIM, NIRATHUKONAM PARAYIL VEEDU
PUNALAL MURI, VELLANADU PAKUTHI,
THIRUVANANTHAPURAM TALUK AND DISTRICT FROM
KOLLANAZHIKAM VEEDU, IRANIMUTTOM MURI
THIRUVANANTHAPURAM TALUK AND DISTRICT.

3. M.SUBAIR, ALUMMOODU VEEDU
NEAR JIEPACHIVILA TEMPLE, NALANCHIRA
ULLOOR VILLAGE, THIRUVANANTHAPURAM FROM
KOLLANAZHIKAM VEEDU, IRANIMUTTOM MURI AND
PAKUTHI, THIRUVANANTHAPURAM TALUK AND DISTRICT.(DIED)
ADDL.APPELLANTS IMPLEADED.

ADDL.APPELLANT 4

ATHUKKA BEEVI, AGED 50, W/O.M.SUBAIR
ALUMMOODU VEEDU, NEAR JIEPACHIVIL TEMPLE
NALANCHIRA, ULLOOR VILLAGE, THIRUVANANTHAPURAM
FROM KOLLANAZHIKAM VEEDU, IRANIMUTTOM MURI AND
PAKUTHI, THIRUVANANTHAPURAM TALUK AND DISTRICT.

ADDL.APPELLANT 5

S.SAJEELA, D/O.M.SUBAIR
-DO-

ADDL.APPELLANT 6

S.SUDHEER, S/O.M.SUBAIR
-DO-

ADDITIONAL APPELLANTS 4 TO 6 IMPLEADED AS THE LEGAL HEIRS OF DECEASED THIRD APPELLANT AS PER THE ORDER DATED 27/3/2007 IN I.A.1252/2006.

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BY ADV. SRI G UNNIKRISHNAN
" SRI.G.P.SHINOD
"SRI.MANU V.
" RAM MOHAN

RESPONDENT: APPELLANT -DEFENDANT

KADIJA UMMAL, PADIVILAKATHU VEEDU,
AIKKARA VEETTU MURI, MUTTATHARA VILLAGE
KALLATTUMUKKU, MANACAUD,
THIRUVANANTHAPURAM.

BY ADV. SRI K L NARASIMHAN,
" C C XAVIER,
" ANILXAVIER

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 02/04/2007 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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S.A. NO.546 OF 1993

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Dated this the 2nd day of April, 2007

JUDGMENT

What is the legal effect of a co-mortgagor redeeming the mortgage, on the right of a non-redeeming co-mortgagor? This is the question to be decided in the second appeal.

2. Plaintiffs in a suit for redemption and partition before Munsiff Court, Thiruvananthapuram are the appellants. Defendant is the respondent. In the suit, appellants sought partition and allotment of 4/14 shares by metes and bounds after redemption of Ext.A3 mortgage dated 18-2-1097(M.E.) over that portion of the plaint schedule property. Plaint schedule property is 21 cents in survey No.447-A of Iranimuttom village of Thiruvananthapuram Taluk. The property admittedly originally belonged to Shalha Ummal and her daughter Aisha Ummal under Ext.A2 sale deed dated 18-2-1097 (M.E.). It was on the date of the sale

deed itself, Shalha Ummal and Aisha Ummal jointly executed Ext.A3 registered mortgage deed after receiving the mortgage money of Rs.1250/- from Captain Mohammed Mohammadeeyan Sahib. Shalha Ummal had, apart from Aisha Ummal, two daughters Pathumma and Saina Beevi and three sons Mohammed Kasim Pillai, Meeran Pillai and Aboobaker. On the death of Shalha Ummal, her right devolved on her children. Aboobacker, her son, under Ext.A1 sale deed dated 25.7.1950, assigned his 2/14 shares in favour of plaintiffs who are the legal heirs of Mohammed Kasim Pillai, who inherited 2/14 shares as the son of Shalha Ummal. Plaintiffs thereby obtained 4/14 shares. The mortgagee Captain Mohammed Muhammadeeyan Sahib died and his mortgage right devolved on his son Abdul Khader who in turn executed a sub mortgage in favour of Mohammed Sali for Rs.250/- in 1116 (M.E.) as per registered deed 3428 of 1116. After the death of Abdul Khader, his right devolved on his three children Asma Beevi, Abdul Khader Sahib and Sainulabdeen Sahib.

In 1950, the intermediary right of Asma Beevi was released as per document No.3727/1950 and the remaining 2/3rd right was released by the respondent as per registered receipt 2306/1972. Under Ext/B5 assignment deed dated 26.6.1969, Sainalabdeen assigned his rights in favour of respondent. in 1972. Under Ext.B13 gift deed respondent transferred her rights in favour of her children Mohammed Hussain and Mohammed Salim on 4.11.1982. The jenmom right of Aisha Ummal over 12 cents of the property, out of Ext.A2 property, was assigned in favour of Sainulabdeen under Ext.B6 sale deed 5081/1950 dated 1-12-1950. Sainulabdeen got assignment of the share of Saina Beevi, the daughter of Salhaummal who had 1/14 shares over the property under Ext.B7. Sainulabdeen instituted O.S.138/1951 for redemption of the submortgage and pursuant to the settlement of the dispute obtained registered document 771/1951 from Mohammad Sali and obtained possession of the entire plaint schedule property in 1951.

Sainulabdeen then created a mortgage in favour of Mohammed Sali as per doument No.2476/1957 for Rs.3200/- and thereafter that mortgage right vested in Haboosa Beevi who assigned that mortgage right in favour of respondent as per registered document 3179/1965. Sainulabdeen then obtained Rs.1800/- and executed a mortgage deed 3191/1965 in favour of respondent. It is inclusive of that right respondent got assignment of the rights under Ext.B5 from Sainulabdeen. Respondent thus obtained rights over the plaint schedule property. The case of appellants was that they are entitled to get their share separated and on such partition, they are prepared to deposit the proportionate mortgage money of Rs.337/- due under Ext.A3 mortgage. A preliminary decree was sought. Respondent in the written statement contended that appellants are not entitled to redeem the mortgage on payment of the proportionate mortgage money as it was barred by time and the mortgagee had made valuable improvements worth Rs.50,000/- and she has

been in possession of the property as full owner. As Sainulabdeen, Abdul Salam and Abdul Jaleel had absolute right over the property, plaintiffs are not entitled to the decree for redemption or partition. It was also contended that the claim for redemption is barred by limitation and even if appellants have any right, it was lost by adverse possession and limitation. Respondent also contended that in any event, she is a tenant entitled to the benefit of Section 4A(1)(c)as defined under Kerala Land Reforms Act, 1965 as she had effected improvements in the plaint schedule property which was a waste land at the time of mortgage and therefore the suit is only to be dismissed.

3. Learned Munsiff framed necessary issues. Additional issue No.7 framed on the plea of respondent claiming benefit under the Kerala Land Reforms Act was answered against respondent without referring the suit to the Land Tribunal, holding that Ext.A2 establish that plaint schedule

property was not a waste land and therefore claim for tenancy raised under section 4A(1)(c) does not arise consideration and the said plea was raised without bona fides and respondent is not entitled to the benefit. Learned Munsiff also found that respondent being a co-owner, her possession of the plaint schedule property could only be for the other co-owners also and as there was no plea of ouster, the defence based on adverse possession is not sustainable. Learned Munsiff after appreciating the evidence found that plaintiffs have 4/14 shares and they are entitled to get their share separated after depositing the proportionate mortgage money of Rs.337/- within six months from date of the preliminary decree. A preliminary decree was thus passed. Respondent challenged the preliminary decree and judgment before District Court, Thiruvananthapuram in A.S. 83/1988. Learned Additional District Judge, on reappreciation of evidence, upheld the finding of learned Munsiff that suit is not barred by adverse

possession and limitation. But learned District Judge found that Ext.A3 mortgage was of 18.2.1097 and the suit was instituted only on 16.3.1981 and a suit for redemption should have been instituted on or before 1.1.1971 as provided under Article 61 of Limitation Act, 1965 and as provided under Rule 6 of Order VII of Code of Civil Procedure, appellants did not plead exemption from operation of Article 61 of the Limitation Act and therefore the claim for redemption is not maintainable. The first appellate Court considered the correctness of the findings of the learned Munsiff that in view of the acknowledgement as provided under section 18 of the Limitation Act, a fresh period of limitation has started to run and the suit is within time also. But analysing Exts.B1, B2 and B4 to B7, learned Additional District Judge held that none of the documents operate as acknowledgement of the debt by the mortgagee and therefore Section 18 of Limitation Act has no application and the period of limitation has not been extended as found by the

trial court. Following the decision of this Court in **Karthiiyayani Amma v. Karthiyayani (1964 KLT 214)** it was held that legal position of a redeeming co-mortgagee, in respect of the mortgage as against the non-redeeming co-mortgagee, is that of a mortgagee and as the mortgage has not been redeemed within the period of limitation, the suit is not maintainable and appellants are not entitled to the decree for redemption or partition. First appellate Court also found that trial court should have referred the question of tenancy claimed by the appellants, to the Land Tribunal under section 125(3) of Kerala Land Reforms Act. But in view of the findings that appellants are not entitled to the reliefs sought for, that question was not further considered. The appeal was allowed and the preliminary decree and judgment were set aside and the suit was dismissed. It is challenged in the second appeal.

4. The Second Appeal was admitted formulating

the following substantial questions of law.

1) Is not the finding of the first appellate court that suit is barred by limitation contrary to law?

2) Is not the finding of the first appellate court that decree of the trial court is without jurisdiction, without referring the question of tenancy to the Land Tribunal, contrary to law?

5. Learned counsel appearing for appellants and respondent were heard.

6. Learned counsel appearing for appellants argued that respondent is only a co-mortgagor and as is clear from Ext.B5 and B13 the entire mortgage right was redeemed and in view of the redemption of the mortgage, the legal position is that she is a co-mortgagor who redeemed the mortgage and as against the non-redeeming co-mortgagor, she is only entitled to claim her proportionate share of the mortgage money. It was argued that in view of the declaration of law by the Apex Court in **Krishna**

Pillai v. Padmanabha Pillai (2004(2) KLT 61), the question whether there is an acknowledgement or not is not very relevant, as the non-redeeming co-mortgagor is entitled to claim partition of the property in the possession of the co-mortgagor, who redeemed the mortgage and therefore the decree for partition as passed by the trial court is to be upheld.

7. Learned counsel appearing for respondent vehemently argued that there is no evidence to prove that Ext.A3 mortgage was redeemed and as rightly found by first appellate Court the suit was filed beyond the period of limitation and the plaint did not disclose any ground for exemption from the operation of Section 18 of the Limitation Act and all the exhibits relied on by the trial court were analysed and distinguished by first appellate court and found that none of the documents operate as acknowledgement of the debt by the mortgagee and in such circumstances the appeal is only to be dismissed. The learned

counsel also argued that in any case, the question of tenancy arose for consideration and for which an issue was framed by the trial court it cannot be decided by the civil court without referring the question of tenancy to the Land Tribunal as provided under section 125(3) of Kerala Land Reforms Act and hence appellants are not entitled to the decree granted by the trial court and the judgment of the first appellate Court is only to be confirmed.

8. The Apex Court in **Ganeshi Lal v. Joti Pershad (1953 SCR 243)** after referring Sir Rashbehary Ghose on Law of Mortgage in India, Harris on Subrogation, Sheldon on Subrogation and English and Indian authorities available on the point, summed up the law as follows:-

> "1. When the co-debtor or co-mortgagor pays more than his share to the creditor for the purpose of redeeming a mortgage,

the redeeming mortgagor is principal debtor to the extent of his share of the debt and a surety to the extent of the share in the debt of other co-mortgagors. The redeeming co-mortgagor being only a surety for the other co-mortgagors, his right is, strictly speaking, a right of reimbursement or contribution.

2. The substitution of the redeeming co-mortgagor in place of the mortgagee does not precisely place the new creditor (i.e. the redeeming co-mortgagor) in place of the original mortgagee for all purposes. If, therefore, one of several mortgagors satisfies the entire mortgage debt, though

upon redemption he is subrogated to the rights and remedies of the creditor, the principle has to be so administered as to attain the ends of substantial justice regardless of form; in other words, the fictitious cession in favour of the person who effects the redemption, operates only to the extent to which it is necessary to apply it for his indemnity and protection. (Digambar Das v. Harendra Narayan Panday (14CWN 617).

3. The doctrine of subrogation must be applied along with other rules of equity so that the person who discharges the mortgage is amply protected and at the same time there is no

injustice done to the other joint debtors. He who seeks equity must do equity.

4. There is a distinction between a third party who claims subrogation and co-mortgagor who claims the right. The co-mortgagors stand in a fiduciary relationship qua each other. The redeeming co-mortgagor can only claim the price which he has actually paid together with incidental expenses. Strictly speaking, therefore, when one of several mortgagors redeems a mortgage, he is entitled to be treated as an assignee on the security which he may enforce in the usual way for the purpose of reimbursing himself. The subrogation to the rights of the

> mortgagee by the redeeming co-mortgagor is confined only to the extent necessary for his own equitable protection. The redeeming co-mortgagor can, just as the surety would, ask to indemnify for his loss and he can invoke the doctrine of subrogation as an aid to right of contribution."

Though the judgment makes it clear that their Lordships were dealing with a case where section 92 and 95 of Transfer of Property Act were not applicable and the question was decided on the principles of justice, equity and good conscience, it is clear that even if section 92 was applicable, as the redeeming co-mortgagor claims to be substituted in the mortagee's place only on the strength of general principles of equity and justice, it would not have made any substantial difference as it is equally inequitable that the

other co-mortgagors should not be called upon to pay more than what the redeeming co-mortgagor paid in discharge of the encumbrance.

9. In **Valliamma Champaka Pilla v. Shivathanu Pillai and others (1979) 4 SCC 429)** a suit instituted by grand daughter of the non-redeeming co-mortgagor for partition on contribution of her share of the mortgage money that had been paid by the redeeming co-mortgagor to the mortgagee, the point was again considered. That was also a case where Section 92 of Transfer of Property Act was not applicable and was decided on the general principles of equity, justice and good conscience.Their Lordships affirmed the view taken in Ganeshi Lal's case on the nature and extent of a redeeming co-mortgagors right to recover contribution from his co-debtor and agreed that the status of a redeeming co-mortgagor is only that of a surety entitled to be subrogated to the extent of getting himself reimbursed for the amount paid by him over and above his share to

discharge the common mortgage debt. It was also held that the right of a non-redeeming co-mortgagor is to pay his share of the liability and get possession of his property from the redeeming co-mortgagor which right subsists only so long as the latter's right of contribution subsists. It was also clarified that this right of the non-redeeming co-mortgagor is purely an equitable right, which exists irrespective of whether right of contribution, which the redeeming co-mortgagor has as against the other co-mortgagor, amounts to a mortgage or not.

10. In **Variayan Saraswathi v. Eachampi Thevi (1993) Suppl.2 SCC 201)** Their Lordships considering the earlier decisions in **Ganeshi Lal's case** and **Valliamma Chempaka Pillai's case** dealt with the contrast in the two situations namely, (1) when a mortgagee assigns his interest in favour of a stranger and (2) where a co-mortgagor or any one on behalf of mortgagor authorised

under law, pays the amount and brings to an end the interest the mortgagee had. It was held that in the first case the assignee becomes holder of the same interest which the mortgagee had and he steps into the shoes of the mortgagee and in the latter case once the mortgage debt is discharged by a person beneficially interested in equity of redemption, the mortgage comes to an end by operation of law and consequently the relationship of mortgagor and mortgagee cannot subsist and a person paying off debt to secure the property either with the consent of the other or on his own volition becomes, in law, the owner entitled to hold and possess the property. It was also held that in equity the right is to hold the property till he is reimbursed and such right in equity either in favour of the person who discharges the debt or the person whose debt has been discharged, does not result in resumption of relationship of mortgagor and mortgagee. Dealing with Section 92 of Transfer of Property Act it has been held that

the rights created in favour of a redeeming co-mortgagor as a result of discharge of debt are “so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems.” The question whether a person who in equity gets subrogated becomes the mortgagee was answered thus”A plain reading of the section (Section 92) does not warrant a construction that the substitute becomes a mortgagee. The expression is 'right(s) as the mortgagee and not 'right (s) of mortgagee and the legislative purpose was statutory recognition of the equitable right to hold the property till the co-mortgagor was reimbursed and not to create relationship of mortgagor and mortgagee. A co-mortgagor in possession of excess share redeemed by him can enforce his claim against non-redeeming mortgagor by exercising rights of foreclosure or sale as is exercised by mortgagee under section 67 of Transfer of Property Act but that does not make him a mortgagee.

11. Analysing the legal principles in the light of the earlier decisions ,their Lordships of the Apex Court in **Krishna Pillai v. Padmanabha Pilla (2004(2) KLT 61 SC)** held:-

> "In our opinion,the law as stated in **Variavan Saraswathi's case** where Section 92 of the Transfer of Property Act has been specifically dealt with and which, as admitted at the Bar, applies to the mortgage in question, clinches the issue arising for decision in that case".

It was then held:-

> "A subrogation rests upon the doctrine of equity and the principles of natural justice and not on the

privity of contract. One of these principles is that a person, paying money which another is bound by law to pay, is entitled to be reimbursed by the other: The principle is enacted in S.69 of the Contract Act, 1872. Another principle is found in equity:"he who seeks equity must do equity" (See Rashbehary Ghose on Law of Mortgage, Seventh Edition, 1997, at p.461).

The present one is a case of subrogation by the operation of law and hence governed by the first para of S.92 of the Transfer of Property Act. The provision recognises the

same equity of reimbursement as underlies S.69 of the Indian Contract Act that "a person who is interested in the payment of money, which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other."Such a payment made, carries with it, at times, an equitable charge.S.92 of the Transfer of Property Act does not have the effect of a substitutee becoming a mortgagee. The provision confers certain rights on the redeeming co-mortgagor and also

provides for the remedies of redemption, foreclosure and sale being available to the substitutee as they were available to the substituted. These rights the subrogee exercises not as a mortgagee reincarnate but by way of rights akin to those vesting in the mortgagee. The co-mortgagor can be a co-owner too. A property subject to mortgage is available as between co-mortgagors for partition, of course, subject to adjustment for the burden on the property. One of the co-mortgagors, by redeeming the mortgage in

its entirety, cannot claim a right higher than what he otherwise had faced with a claim for partition by the other co-owner. He cannot defeat the legal claim for partition though he can insist on the exercise of such legal right claimed by the other co-owner -cum-mortgagor being made subject to the exercise of the equitable right vesting in him by subrogation."

12. The facts in Krishna Pillai's case reveal that plaintiff in that suit was an assignee from certain non-redeeming co-mortgagors for a share in the c schedule property. The property was subjected to an usufructuory mortgage of the year 1078 (M.E.). After a partition, 10 members out of

18 to whom different portions of the mortgaged property were allotted instituted a suit for redemption which was decreed in 1950. After the decree one of them, got C schedule property redeeemed by making full payment of the mortgage money and entered possession of the property in 1953. The suit was filed for declaration of title with recovery of possession and in the alternative for partition. Holding that in Valliamma Champaka Pillai's case the plaintiff treated the suit as one for redemption and hence the article relevant to the suit for redemption of a mortgage would apply their Lordships held:-

> "It is to be noted that the limitation for a suit for contribution would become relevant only when the redeeming co-mortgagor sues the non-redeeming co-mortgagor for enforcing the latter's obligation to make

contribution; a suit filed by a co-owner-cum-co-mortgagor for partition and separate possession against the redeeming co-mortgagor and subject to payment of contribution would remain a suit for partition though the defendant in possession of the property would be justified in insisting that property was not liable to be partitioned unless the plaintiff contributed his share of the money paid for redemption and incidental expenses. To the latter case, wherein the suit has been filed not by the party claiming contribution but the right to claim partition

was being set up only as defence in equity, the limitation provided for filing a suit for contribution cannot apply."

But construing the suit as predominantly one for partition. It was held:-

"In our opinion, the suit filed in the present case being a suit for partition primarily and predominantly and the relief of redemption having been sought for only pursuant to the direction made by the High Court in its order of remand, the limitation for the suit would be governed by Art.120 of Limitation Act, 1908. For a suit for partition the starting point of limitation

is-when the right to sue accrues, that is, when the plaintiff has notice of his entitlement to partition being denied. In such a suit, the right of the redeeming co-mortgagor would be to resist the claim of non-redeeming co-mortgagor by pleading his right of contribution and not to part with the property unless the non-redeeming co-mortgagor had discharged his duty to make contribution. This equitable defence taken by the redeeming co-mortgagor in the written statement would not convert the suit into a suit for contribution filed by the non-redeeming co-

mortgagor".

13. The settled legal position can be summed up as follows:- When a co-mortgagor pays the mortgage money to the mortgagee and brings to an end the interest the mortgagee had, the mortgagor mortgagee relationship comes to end. The right created on the redeeming co-mortgagor as a result of such discharge of debt is only to hold the property till the co-mortgagor was reimbursed and not to create relationship of mortgagor and mortgagee. The right of redemption, foreclosure and sale available to the redeeming mortgagor is not as a mortgagee but by way of rights akin to those vesting in the mortgagee. The co-mortgagor can be a co-owner too, as in this case. The property subject to the mortgage is available for partition between the co-owners/co-mortgagors, subject to the adjustment for the burden on the property. A co-mortgagor by redeeming the mortgage in its entirety, cannot claim a right higher than what he had otherwise, faced with a claim for partition by

the other co-owner. Such a suit is governed under Article 113 of Limitation Act, 1963 (Section 120 of Limitation Act, 1908) and the starting point of limitation is when the right to sue accrues . In such a suit the right of redeeming co-mortgagor is only to plead contribution and not to part with the property unless the non-redeeming co-mortgagor had discharged his contribution.

14. In view of the settled legal position, the findings of the first appellate court relying on the decision in **Valliamma Champaka Pillai v. Sivathanu Pillai (1979) 4 SCC 429)**is not correct. Respondent the co-mortgagor, who redeemed the mortgage, cannot claim a right higher than she otherwise could have claimed. The suit is primarily and predominantly for partition. A suit for partition even without seeking a decree for redemption, is maintainable. The remedy of respondent, the redeeming co-mortgagor, is only to claim the amount due to her, which is to be

reimbursed by the non-redeeming co-mortgagor. Therefore if there was a redemption of Ext.A3 mortgage as claimed by the appellants, they are entitled to get a decree for partition. Respondent in that event could only claim for reimbursement of the proportionate mortgage money due to her, that was paid by her, for redeeming the mortgage.

15. The crucial question then is whether there was a redemption of Ext.A3 mortgage. The first appellate court analysing Ext.B5, which shows that the mortgage was yet to be redeemed held that there is no evidence to support the case of appellants that the mortgage was redeemed. Evidently learned District Judge omitted to take note of Ext.B13 gift deed executed by respondent herself. Under Ext.B5, the property was purchased by respondent from Sainulabdeen for a consideration of Rs.6750/-. Out of the said consideration, Rs.1141.68 was paid in cash at the time of its execution. Rs. 633.32 being the 2/3rd of the mortgage money to be paid for redemption and

Rs.4975/- which was outstanding to be paid to the assignee, were adjusted on the total consideration of Rs.6750/-. It was specifically recited in Ext.B5 that the only outstanding liability over the property is the 2/3rd mortgage money under Ext.A3 mortgage which was outstanding to be redeemed. It also provides that respondent being the assignee had to pay the said mortgage money of Rs.633.32 to him/her whoever is entitled to the same as mortgagee. Ext.B13, under which the property was gifted by respondent makes it absolutely clear that the liability provided under Ext.B5 was discharged and a registered receipt 2306/1972 was obtained. This crucial fact was omitted to be taken note of by learned District Judge. The recital in Ext.B13 establishes that Ext.A3 mortgage was redeemed. Added to this, when examined as DW1, it was unambiguously admitted by respondent herself that Ext.A3 mortgage does not subsist. When she was specifically asked whether the mortgage was subsisting she answered that no mortgage was

subsisting. Therefore the finding of the first appellate court that there is no evidence to prove that the mortgage was redeemed is not sustainable.

16. Then the question is whether respondent is a tenant entitled to the benefit of Kerala Land Reforms Act and whether, as found by the first appellate court, the question of tenancy has to be decided only after reference to the Land Tribunal as provided under section 125(3) of Kerala Land Reforms Act. The claim for tenancy raised by the respondent was based on Section 4A(1)(c) of Kerala Land Reforms Act and that too on the basis that plaint schedule property was a waste land at the time of the mortgage and the mortgagee had effected substantial improvements in the mortgaged property before the commencement of Kerala Land Reforms Act, 1969 and so she is entitled to the protection.

17. Section 4A(1)(c) of the Kerala Land Reforms Act reads:-

"4A.Certain mortgagees and

lessees of mortgagees to be deemed tenants:-

(1) Notwithstanding anything to the contrary contained in any law or in any contract, custom or usage, or in any judgment, decree or order of court, a mortgagee with possession of land, other than land principally planted with rubber, coffee, tea or cardamom, or the lessee of a mortgagee of such land shall be deemed to be tenant if-

xx xx xx xx

xx xx xx xx

(c)the land comprised in the mortgage was waste land at the time of mortgage or land to which the Madras Preservation of Private

Forests Act, 1949 would have applied if that Act had been in force at the time of mortgage, and:

(i) the mortgagee or lessee was holding such land for a continuous period of not less than thirty years immediately preceding the commencement of the Kerala Land Reforms (Amendment) Act, 1969; and

(ii) the mortgagee or lessee has effected substantial improvements on such land before such commencement.

18. In order to claim the protection under section 4A(1)(c), respondent has to establish that the property mortgaged was a waste land, at the time of mortgage and the mortgagee has effected substantial improvements on such land before commencement of Kerala Land Reforms (Amendment) Act

1969 on 1.1.1970. The question is whether plaint schedule property, when it was mortgaged under Ext.A3, was a waste land or not.

19. This aspect is to be considered, to decide the question whether the claim for tenancy raised by respondent is to be referred to the Land Tribunal under section 125(3) of Kerala Land Reforms Act. As held by the Full Bench in **Kesava Bhat v. Subraya Bhat (1979 KLT 766)** when a question of tenancy arises for consideration, civil court can decide that question only after a reference as provided under section 125(3) of Kerala Land Reforms Act. But all questions raised, will not arise for consideration. Even when a claim for tenancy is raised, if on the undisputed facts the question will not arise for consideration for the reason that the claim will not lie or that the claim is prima facie not sustainable, the question of tenancy raised need not be referred to the Land Tribunal and civil

court of its own can decide that question.

20. Apex Court in **Thomas Antony v. Varkey Varkey (2000) 1 SCC 35)** settled the legal position thus:-

> "Section 125(3) of the Kerala Land Reforms Act (for short "the Act") requires that the civil court shall refer the question regarding the right of a tenant or a kudikidappukaran (including the question whether a person is a tenant or a kudikidappukaran) to the Land Tribunal having jurisdiction over the area concerned. The section makes it clear that a reference to the Land Tribunal need be made only

if such question "arises" in the suit or other proceedings concerned. It has been consistently held by the High Court of Kerala that unless such question legally arises there is no need to make the reference to the Land Tribunal under section 125(3) of the Act (vide the larger Full Bench decision in Kesava Bhat v. Subraya Bhat and another Full Bench decision in Mohd Haji v. Kunhunni Nair). Subsequently the High Court of Kerala has held that unless the question genuinely arises the civil court is not obliged to make the reference

(Sundaran v. Mohd.Koya).

The civil court can consider whether the plea raised by the party that he is a tenant or a kudikidappukaran is a bona fide contention. If there is not even a remote possibility of the said plea being upheld by the Land Tribunal the civil court can conclude that the question does not reasonably arise in the case. Such an unreasonable plea would be raised with the idea to procrastinate or prolong the litigation. The civil court cannot afford to aid such sinister tactics."

21. If the property mortgaged under Ext.A3 was not a waste land at the time of mortgage, then the benefit claimed under Section 4A(1)(c) cannot be made at all, and in that case though tenancy was raised basing on Section 4A(1)(c), the question will not arise for consideration and in that view of the matter, no reference under section 125(3) of Kerala Land Reforms Act is warranted. The question is whether the plaint schedule property was a waste land on the date of the mortgage under Ext.A3.

22. This court in **Mathai Varkey v. Mariam (1969 KLT 503)** had occasion to consider the meaning and ambit of waste land as provided under section 4A. Following the decision of the Apex Court in **Raja Anand Brahma Shah v. State of Uttar Pradesh (AIR 1967 SC 1081)**a learned single Judge of this Court (as His Lordship then was) held that there may be different connotations for the same expression in different statutes and features

emphasised in a legislation conferring fixity of tenure on tenants may be a matter of indifference in a statute which deals with acquisition of land by the State and valuation for the purpose. Analysing Section 4A it was held that at the time of mortgage, when the mortgagee was inducted into possession, the land must be such as to be designated as neglected, uncultivated and not put to any serious agricultural use. It was further held that the section further contemplates that the holding having been improved substantially by the mortgagee.

23. A mortgagee is entitled to the benefit only if at the time of the mortgage, when he was inducted in possession of the property, the mortgaged property was a waste land. The land must be uncultivated or not put to serious cultivation. If it was not a waste land, the benefit claimed under section 4A (1))c) will not lie and if so the plea, though raised will not prima facie arise for consideration.

24. The trial court relying on Ext.A2 held that the property mortgaged was not a waste land at the time of mortgage. Ext.B8,B2 and B9 fortify the finding that the property was not a waste land at the time of inducting the mortgagee in possession of the property. It is to be borne in mind that the mortgagors themselves obtained the right over the property mortgaged under Ext.A3,only on the date of execution of the mortgage under Ext.A2. Ext.A2 establishes that the property is inclusive of the buildings, well and trees and other improvements and was not a waste land. In the light of Ext.A2, respondent is not entitled to contend that it was a waste land at the time of creation of Ext.A3 mortgage. If that be so, respondent is not entitled to contend that she is deemed to be a tenant as provided under section 4A (1)(c) of Kerala Land Reforms Act. As it was not a waste land and no sustainable plea could be raised under section 4A(1)(c), there was no necessity to refer the question to the Land

Tribunal, as rightly found by the trial court. Evidence establish that respondent is not a deemed tenant and is not entitled to the protection of Kerala Land Reforms Act. Therefore appellants are entitled to a decree for partition and allotment of their 4/14 shares in the plaint schedule property on payment of their share of the mortgage money.

Second Appeal is allowed. The judgment and decree passed by the first appellate court in A.S.83/1988 are set aside. A preliminary decree is passed as follows:- The plaint schedule property is available for partition. It shall be divided into 14 equal shares and 4 such share be allotted to the plaintiffs. Respondent is entitled to Rs.337/- being the proportionate share of the mortgage money from the plaintiffs. The cost of the suit shall come out of the estate. The suit is adjourned sine die.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006 **M.SASIDHARAN NAMBIAR,J.**

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W.P.(C) NO. OF 2006
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Dated this the day of 2007

JUDGMENT

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A.NO.546 /1993

JUDGMENT

2ND APRIL,2007